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Remedial Consequences of Classification of a Privacy Action: Dog or Wolf, Tort or Equity?

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I. Introduction

> There can be no real dispute that a claim for breach of confidence is not a claim in tort … [H]istory does not determine identity. The fact that dogs evolved from wolves does not mean that dogs are wolves. … I conclude that the tort of misuse of private information is a tort within the meaning of ground 3.1 (9) [of the Civil Procedure Rules].[1]

In *Google Inc v Vidal-Hall*,[2] the Court of Appeal affirmed Tugendhat J's determination that misuse of private information was a tort for the purposes of the Civil Procedure Rules and was distinct from the equitable cause of action for breach of confidence. This was a significant development in the evolution of misuse of private information, which had originated a little over a decade earlier out of breach of confidence. The transformation of misuse of private information from equitable wrong to tort could be expected to have an impact on the remedies available and the principles upon which they are granted.

This chapter considers some of the remedial consequences of classifying 'wrongful misuse of private information' as a cause of action in tort, rather than as the basis of a claim for relief in equity. Many of these consequences are more than merely procedural: they affect the substance of the parties' rights and obligations. In particular, we consider issues relating to choice of law, vicarious liability, damages and injunctions. This chapter argues that a number of significant doctrinal issues about the remedies for misuse of private information have not been identified, let alone adequately addressed, in this cause of action's transformation from equitable to tortious.

[1] *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB), [2014] 1 WLR 4155, [52], [57] [70] *per* Tugendhat J (*Vidal-Hall* (QB)).

[2] *Google Inc v Vidal-Hall* [2015] EWCA Civ 311, [2016] QB 1003 (*Vidal-Hall* (CA)).

A. Background

The decision in *Google Inc v Vidal-Hall* that misuse of private information is a tort was the culmination of a process of tentative reclassification that had begun over a decade earlier. Yet *Google Inc v Vidal-Hall* was the first case in which the classification of misuse of private information was of practical importance to the outcome of a dispute, rather than forming mere obiter dicta.

The issue in the case was whether the claimants could rely on the Civil Procedure Rules (CPR), which allowed a court to give leave to serve a tort claim outside the jurisdiction. The question therefore was whether the claimants' claim against Google – that it had misused their private information – was a claim in 'tort'. Tugendhat J draws a distinction between an historical approach taken by courts to the meaning of legal terminology ('to look back to the history or evolution of the disputed term')[3] and an approach that looks forward to the legislative purpose underlying the relevant rule in which the term appears. The former has been the more common approach in cases dealing with the CPR. Yet, as quoted at the start of this chapter, while he eschewed the history of the common law and equity as explaining why service outside the jurisdiction should be denied for an equitable claim, his judgment does not otherwise delve into legislative purpose in relation to the rule. Having decided that he was not bound by the approach of the Court of Appeal in *Douglas v Hello! Ltd (No 3)*,[4] limited as it was to the traditional action for breach of confidence, Tugendhat J rested his classification of the action for misuse of private information on the use of the word 'tort' to describe the action in a number of recent cases. In none of these, it should be noted, did anything turn on the classification. It is also arguable, as we discuss later, that even a tort classification in *Douglas v Hello! (No 3)* may have made no difference to the choice of law issue discussed there if it could have been successfully argued that the key 'event' in the 'tort', using the language of the relevant statute on choice of law,[5] was the disclosure of the private information in the United Kingdom (UK),[6] regardless of whether a prior wrong was committed in New York.[7]

It was at the very outset of the 'extended'[8] action for breach of confidence – the well-established action having been given new life in *Campbell v MGN Ltd*[9] in 2004 – that Lord Nicholls had embraced the 'tort' nomenclature. His Lordship

[3] *Vidal-Hall* (QB) (n 1) [54].

[4] *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595, [2006] QB 125 (*Douglas* (CA)).

[5] Private International Law (Miscellaneous Provisions) Act 1995, s 11.

[6] *Vidal-Hall* (QB) (n 1) [65], citing *Douglas* (CA) (n 4) [100]–[101].

[7] The double-actionability rule was abolished for most torts by the Private International Law (Miscellaneous Provisions) Act 1995 (UK), s 10. See further NA Moreham and Sir Mark Warby, *Tugendhat and Christie: The Law of Privacy and the Media*, 3rd edn (Oxford, Oxford UP, 2016) [13.85].

[8] Here we adopt the terminology used by T Aplin, L Bentley, P Johnson and S Malynicz, *Gurry on Breach of Confidence: The Protection of Confidential Information*, 2nd edn (Oxford, Oxford UP, 2012), eg [7.147].

[9] *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

described the nomenclature of 'breach of confidence' as misleading, because the modern cause of action 'has now firmly shaken off the limiting constraint of the need for an initial confidential relationship'.[10] He went on:

> The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.

Lord Nicholls' 'tort' nomenclature was not picked up by the other judges in *Campbell*, who, rather, discussed the nature and changing rationale of the modern action for breach of confidence. While the new nomenclature was increasingly raised as a classification query or possibility by courts and academic commentators alike,[11] the Court of Appeal in *Douglas v Hello! Ltd (No 3)*[12] preferred to see the Douglases' claim as resting on the equitable action for breach of confidence rather than as a tort, for the purposes of determining the applicable law to determine the dispute, an issue discussed later in this chapter.

In the Douglases' appeal to the House of Lords, heard together with *OBG v Allan* and other actions,[13] Lord Nicholls went further than merely reclassifying the existing cause of action. He stated (obiter):

> As the law has developed breach of confidence, or misuse of confidential information, now covers two distinct causes of action, protecting two different interests: privacy, and secret ('confidential') information. It is important to keep these two distinct.[14]

Treating the extended action as an entirely new cause of action rather than as a new formulation of an existing one was contrary to the express views of other members of the House of Lords in *Campbell*, for example Baroness Hale:

> The 1998 Act does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties' Convention rights. In a case such as this, the relevant vehicle will usually be the action for breach of confidence.[15]

Further, in dismissing an appeal from Tugendhat J's judgment, the Court of Appeal of England and Wales in *Google Inc v Vidal Hall* adopted the new nomenclature, while at the same time insisting that, in doing so, they were not creating a new

[10] ibid [14].

[11] As early as 1972: PM North, 'Breach of Confidence: Is there a New Tort?' (1972) 12 *Journal of the Society of Public Teachers of Law* 149, after Lord Denning in *Seager v Copydex Ltd* [1967] 1 WLR 923 (CA) had awarded 'damages' or equitable compensation. See further M Richardson, M Bryan, M Vranken and K Barnett, *Breach of Confidence: Social Origins and Modern Developments* (Cheltenham, Edward Elgar, 2012) 138.

[12] *Douglas* (CA) (n 4).

[13] *OBG v Allan* [2007] UKHL 21, [2008] AC 1 ('*Douglas* (HL)').

[14] ibid 72, [255].

[15] *Campbell* (n 9) [132].

cause of action. They felt the references to the action as a tort by various judges could not be dismissed as 'mere loose use of language; they connote an acknowledgment, even if only implicitly, of the true nature of the cause of action':[16]

> Against the background we have described, and in the absence of any sound reasons of policy or principle to suggest otherwise, we have concluded in agreement with the judge that misuse of private information should now be recognised as a tort for the purposes of service out the jurisdiction. *This does not create a new cause of action.* In our view, it simply gives the correct legal label to one that already exists. We are conscious of the fact that there may be broader implications from our conclusions, for example as to remedies, limitation and vicarious liability, but these were not the subject of submissions, and such points will need to be considered as and when they arise.[17]

It may be that, despite the absence of any significant discussion of the legislative purpose behind the CPR, the decision in *Google* is confined to its statutory context. This may explain both the apparent ease of coming to the result and also the otherwise puzzling rejection of the leave application by the Supreme Court of the UK on the classification point, on the basis that there was not 'an arguable point of law'.[18] It would seem odd indeed that the substantive and procedural differences of claims in tort and claims in equity do not raise any arguable points of law.

Tugendhat J noted that '[a] term may have different meanings in different contexts'.[19] It is possible that, for other purposes, a court may come to a different conclusion on the classification of the cause of action for misuse of private information. While this now seems unlikely, the implications identified by the Court of Appeal in the passage above as arising out of classification, and other issues of substance, remedy and procedure, are bound to arise in the future.

While the Court of Appeal insisted, in the passage quoted above, that it was not thereby creating a new cause of action, the judgment also adopts what it described as the 'highly influential'[20] view of Lord Nicholls in *OBG v Allan* that 'there are now two separate and distinct causes of action: an action for breach of confidence; and one for misuse of private information'.[21] Given the explicit statements to the contrary or the silence on this point by other members of the House of Lords in the foundational cases, it is not just the point of transformation from a wolf into a dog, but also the birth of the new species of action that remains a mystery. While no modern common lawyer would doubt that judges can make new law,[22] judges

[16] *Vidal-Hall* (CA) (n 2) [26].
[17] ibid [51] (emphasis added).
[18] Supreme Court, 'Google Inc (Appellant) v Vidal-Hall and others (Respondents)' (*Permission to appeal decisions by UK Supreme Court*, 28 July 2015), www.supremecourt.uk/news/permission-to-appeal-decisions-28-july-2015.html.
[19] *Vidal-Hall* (QB) (n 1) [54].
[20] *Vidal-Hall* (CA) (n 2) [22] *per* Dyson MR and Sharp LJ.
[21] ibid [21].
[22] *Prince Alfred College v ADC* [2017] HCA 37, (2016) 258 CLR 134, [127] *per* Gageler and Gordon JJ, citing O Dixon, 'Concerning Judicial Method' in *Jesting Pilate and Other Papers and Addresses*, 2nd edn (Melbourne, Law Book Co, 1997) 152, 155, 157–58.

do need to be explicit when they are doing so, rather than hiding new law under the subterfuge that it already existed.

For Australia, the issue of classifying privacy claims remains partly hypothetical. Although the High Court in 2001 opened the door to possibly radical development in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,[23] the common law has so far seen only a modest (but nonetheless significant) extension of the traditional equitable action of breach of confidence,[24] and no development at a superior court level of any separate tort or torts of invasion of privacy.[25] No doubt, at some point in the future, the right case will put the issue as to how a court should respond to the High Court's open door squarely in contention: by fashioning a new tort, or by extending existing actions? If an Australian State or the Federal Government does one day decide to follow the proposal of the Australian Law Reform Commission (ALRC) and design a new statutory action for invasion of privacy, many of the questions raised in this chapter and the prospect of unnecessary litigation should be seen as further support for the ALRC's recommendation that the action be called a 'tort' in any legislation.[26]

The ALRC also recommended that the statutory tort make actionable two types of invasion of privacy, broadly defined: misuse of private information and intrusion into seclusion. This was intended to increase certainty as to the proposed legislation's scope of application (in an environment where there would be general reluctance to support a broad-based right of action with components left undefined), and also to give priority (in an environment of caution as to *any* legislative intervention) to the types of serious privacy invasion that had most commonly occurred in other countries. For the purposes of common law development, we wonder whether the wrong should be more broadly defined as wrongful 'dealing' to capture not just wrongful disclosure and/or misuse of private information, but also a broader range of privacy invasions, including wrongful snooping and collection of private information. There is a difficult issue of whether different forms of invasion of privacy should found separate causes of action. Certainly, an 'intrusion' into privacy, being analogous to trespass, seems most obviously classified as tort.[27] While there may be an intrusion into privacy without actual collection, use or disclosure of information, and conversely there may be a wrongful

[23] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, (2001) 208 CLR 199.

[24] That is, in allowing compensation for mental distress in the equitable claim: *Giller v Procopets* [2008] VSCA 236, (2008) 24 VR 1 ('*Giller* (CA)'); *Wilson v Ferguson* [2015] WASC 15.

[25] Cf *Grosse v Purvis* [2003] QDC 151, (2003) Aust Torts Reports 81-706; *Doe v Australian Broadcasting Corporation* [2007] VCC 281. Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (ALRC Report 123, 2014).

[26] ALRC (n 25) recommendation 4-2. The Court of Appeal in *Vidal-Hall* (n 2) referred to this recommendation in support of its conclusion at [44].

[27] There is some debate as to whether, even if the extended action encompasses the deliberate collection of private information, as held in *Imerman v Tchenguiz* [2010] EWCA Civ 908, [2011] 2 WLR 592, [68], the traditional action for breach of confidence does too.

disclosure without a preceding wrongful intrusion or collection, it may seem quite artificial, or unnecessarily duplicative, for the purposes of damages, to keep the various forms of invasion of privacy as separate causes of action. On the other hand, particularly in cross-border disputes or for the purposes of limitation periods, there may be a significant advantage for a claimant in treating each stage of an invasion as giving rise to a separate action. A statutory action can build in some limitations on multiple actions arising out of related matters, such as a first publication rule,[28] but the common law is less able to do so, and courts and defendants can rely only on rules against abuse of process to discourage an overly litigious or persistent claimant.

Like any aspect of law, the remedial and substantive consequences of classification of privacy claims may not be uniform across jurisdictions. They may vary according to the law of the forum or the applicable law. There are now clear differences of approach on a number of issues in the law of obligations and remedies between the courts of the UK, Canada, New Zealand and Australia, to name a few jurisdictions. The approach of the jurisdiction in which the dispute is brought may govern several questions: for a start, the first question in a cross-border dispute, of which law the court should apply. For this reason, we begin with the difficult issue of choice of the proper law of the dispute, and then move on to two issues identified by the Court of Appeal in *Google Inc v Vidal Hall*: vicarious liability and remedies.[29] The last can obviously be divided into many sub-issues relating to injunctions, damages, and the availability of gain-based remedies such as an account of profits and so on. The availability of defences may also depend on classification, but we do not consider that issue here.[30]

Broader questions underlie the specific remedial issues. When is the cause of action complete: on 'breach', or on loss? Is it actionable per se? Where claims fit within both the traditional and the extended action, as in *Campbell v MGN* itself, will the claimant have concurrent or multiple claims?[31] We cannot answer all these questions, but we do pose them to illustrate that classification of the wrong in broad terms as a tort is only a starting point.

[28] eg Defamation Act 2013 (UK), s 8(4).

[29] As to the third issue identified by the Court of Appeal in *Vidal-Hall,* limitation periods, see Moreham and Warby (n 7) [11.217] et seq.

[30] See further B McDonald, 'Privacy Claims: Transformation, Fault and the Public Interest Defence' in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Tort* (Oxford, Hart Publishing, 2015) 297, noting that the issue of defences requires the identification of key elements of any new tort: Is it one of strict liability? If not, on what fault does it rest: lack of conscience or lack of care or intent/recklessness?

[31] Lord Hoffmann observed in *Campbell* (n 9) [53], 'the cause of action fits squarely within both the old and the new law. The judge found that the information about Ms Campbell's attendance at NA had been communicated to the *Mirror* in breach of confidence and that the *Mirror* must have known that the information was confidential. As for human autonomy and dignity, I should have thought that the extent to which information about one's state of health, including drug dependency, should be communicated to other people was plainly something which an individual was entitled to decide for herself'.

II. Choice of Law

Classification of a cause of action is of course fundamental to the choice of the appropriate law to be applied to the dispute. If, for example, an obligation of privacy or confidence had its source in a contract between the parties, as is often the case, the applicable substantive law would be the 'proper law of the contract', however that is determined.[32]

But where there is no contract involved, will it make a difference if a privacy cause of action is classified as a tort or an equitable action? The authors of *Gurry* merely identify the problem:

> Once more, the important matter is characterization. If breach of confidence is a matter related to tort then the choice of law rules are those set out in [the 1995 Act] or if not, the 'proper law' of the equitable obligation applies. There is some confusion in the area … It is therefore clearly worth considering both potential characterizations (tort and equitable obligations) before considering which is the most appropriate.[33]

A. Choice of Law in Tort

If the wrongful disclosure of private information is, or is to be treated as, a tort then the relevant choice-of-law rule in Australia is now clear: the forum must apply the substantive law[34] of the place of the tort, the *lex loci delicti*.[35] Such a simple rule will not, however, resolve all practical problems because of the operation of the doctrine of *renvoi*,[36] or because it may be difficult in multi-jurisdictional events or transactions to determine precisely where the tort occurred.[37] The situation will become more complicated if the invasion of the claimant's privacy involved multiple successive forms – perhaps first an intrusion into seclusion

[32] See further M Davies, AS Bell and PLG Brereton, *Nygh's Conflict of Laws in Australia*, 9th edn (Chatswood, NSW, LexisNexis, 2013) ch 19. See Moreham and Warby (n 7) [13.83] as to the impact of the Rome I Regulation (Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6) for claims in Europe.

[33] Aplin et al (n 8) [23.75].

[34] Some uncertainty remains in distinguishing substantive and procedural aspects of law: see, eg, *Dyno Wesfarmers v Knuckey* [2003] NSWCA 375, [45] *per* Handley JA.

[35] *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36, (2000) 203 CLR 503 in respect of torts within Australia; *Regie Nationale des Usines Renault SA v Zhang* [2002] HCA 10, (2002) 210 CLR 491 in respect of international torts. See further Davies, Bell and Brereton (n 32) [20.1]–[20.4].

[36] *Renvoi* (meaning 'return' or 'reference back') is a conflict of laws doctrine that is concerned with whether a reference to a foreign legal system includes reference to that foreign legal system's conflict-of-laws principles. If the reference to that foreign legal system includes its conflict-of-laws principles, that foreign legal system may refer the case back to the original legal system or on to a third legal system. See *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54, (2005) 223 CLR 331, [86] *per* Gummow and Hayne JJ. See also R Mortensen, R Garnett and M Keyes, *Private International Law in Australia*, 3rd edn (Chatswood, NSW, LexisNexis, 2015) 427.

[37] Mortensen, Garnett and Keyes (n 36) 433.

to collect information, then some misuse or private viewing of the information (for example, viewing of private images), then communication of those images in various formats and across boundaries, including on the Internet.

Even identifying the place of an intrusion may be problematic: while physical intrusions are easy enough to locate by reference to the claimant's and defendant's location, things become more complicated with electronic remote intrusions. Where is the tort committed by a person in one jurisdiction hacking into a person's personal computer located in another? Or where the perpetrator – assuming the film *Snowden* was not mere science fiction when describing the excesses of the US National Security Agency – uses software in one jurisdiction to control a webcam from a person's computer in another jurisdiction to capture footage or recordings of the latter's activities and conversations? Conclusions on these questions would require analysis of analogous situations in other multi-jurisdictional tort claims.

However, at least as far as *publication* of private information is concerned, the law can take some guidance from decided cases in defamation, misrepresentation and breach of confidence. In defamation law, the approach of the High Court of Australia in *Dow Jones v Gutnick* to determining the place of an Internet publication is well-accepted at common law: applying *Duke of Brunswick v Harmer*,[38] the tort is complete when and wherever the defamatory statement is downloaded, in that case, the State of Victoria.[39] The same principles still apply in English defamation law,[40] despite the introduction of a limitation period based on the first publication of substantially the same matter.[41]

Presumably, the same approach would apply to publication or use of private information if it is the publication or use that is tortious,[42] although Moreham and Warby note that it could be argued that, if the essence of the wrong is seen to be hurt to feelings, the place where the harm is suffered may be the more appropriate location of the action.[43]

But what of collection in one jurisdiction and misuse or disclosure in another? Will they each found a cause of action, with potentially different law applying to each? By contrast to Australian law, which looks to the place of the tort, the approach under the European Rome II convention is to look primarily, but not exclusively, to the law of the place where the damage occurred.[44] However, this rule applies to

[38] *Duke of Brunswick v Harmer* (1849) 14 QB 185.

[39] *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, (2002) 210 CLR 575. See also *Berezovsky v Michaels* [2000] UKHL 25, [2000] 1 WLR 1004; *Lewis v King* [2004] EWCA Civ 1329; *Douglas* (CA) (n 4). Cf actions based on publications in more than one Australian State, now governed by the uniform Defamation Acts, eg Defamation Act 2005 (NSW), s 11, which requires the court to apply the law of the State with which the harm has the closest connection. See further D Rolph, *Defamation Law* (Pyrmont, NSW, Thomson Reuters, 2016) [8.160].

[40] *Shevill v Presse Alliance SA* [1996] AC 959.

[41] Defamation Act 2013, s 8.

[42] *WXY v Gewanter* [2012] EWHC 1601 (QB).

[43] Moreham and Warby (n 7) [13.59].

[44] Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40, Art 4(1).

torts and other non-contractual obligations, except those 'arising out of violations of privacy and rights relating to personality, including defamation'.[45] We gather that privacy and defamation claims were excepted because consensus could not be reached.[46] Because of this exception, a claim in the UK for breach of confidential information that is *not private* information will (currently, at least) be determined by Rome II, while a claim for misuse of *private* information will have the applicable law determined, if a tort or delict, by Part III of the Private International Law (Miscellaneous Provisions) Act 1995. The latter generally applies the *lex loci delicti*, unless displaced by a substantially more appropriate law.[47] But it is worth noting the full provision as it applies to multi-jurisdictional 'events', particularly given that most privacy breaches result in mental distress, which, as arguably a form of impairment of one's mental condition, is treated as personal injury.[48] In such a case, the law of the place where the individual sustained the injury might prevail:

11 Choice of applicable law: the general rule

(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.

(2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being—

  (a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;

  (b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and

  (c) in any other case, the law of the country in which the most significant element or elements of those events occurred.

(3) In this section 'personal injury' includes disease or any impairment of physical or mental condition.

B. Choice of Law in Equity

How would the situation differ if the claim for misuse of private information were characterised as still lying in equity? While the rules with respect to tort are clear in principle (even if difficult in practice), the same cannot be said about choice

[45] ibid, Art 1(2)(g).

[46] A Dickinson, *The Rome II Regulation* (Oxford, Oxford UP, 2008) 57, fn 389.

[47] Aplin et al (n 8) [23.80].

[48] In this way, cases in New South Wales dealing with mental distress resulting from breach of contract have come within restrictions under the *Civil Liability Act* 2002 (NSW), which relate to negligence: eg *Insight Vacations Pty Ltd v Young* [2010] NSWCA 137, (2010) 78 NSWLR 641 (appeal to High Court of Australia on other grounds dismissed); *Flight Centre Ltd v Louw* [2011] NSWSC 132, (2010) 78 NSWLR 656.

of law in equity. The rules are commonly described as 'ill defined'.[49] Questions about choice of law in equity elicit responses such as, 'Ah, you're getting into unexplored territory there.' Or, 'That's a difficult and uncertain issue.' There seems to be a much higher level of theory and commentary than settled legal principle.[50] *Gurry*, in the passage quoted at the start of section II, refers to the 'proper law' of the equitable obligation. In obligations having some foundation in contract, this makes sense: it is said that separate characterisation of an equitable claim makes no sense when other key issues in the same action fall to be decided under other fields.[51] However, the difficulty lies in circumstances that do not have a foundation in contract, agreement or some other nominate classification. Is the best classification of such freewheeling obligations or wrongs that they fall in tort? Yeo posits that fine and difficult distinctions will fade

> once we accept that 'torts' here is not used as a legal term of art in the domestic law sense of wrongs recognised by the common law courts, but a category containing functionally equivalent rules for solving particular kinds of social problem. If necessary, the torts category could be re-labelled 'wrongs' to remove any possible misconception of doctrinal connections with torts in the narrow meaning in the domestic common law.[52]

In *Google Inc v Vidal Hall*, the Court of Appeal quoted the authors of the 15th edition of *Dicey, Morris & Collins on the Conflict of Laws*, who argued that all non-contractual claims to protect privacy should be treated as involving issues of tort under the Private International Law (Miscellaneous Provisions) Act 1995 (UK).[53]

C. *Douglas v Hello! (No 3)*

The Court of Appeal in *Google Inc v Vidal Hall* obviously had to deal with the effect of the decision in *Douglas v Hello! Ltd (No 3)*.

In relation to the action for breach of confidence, the Court of Appeal in *Douglas v Hello! (No 3)* had applied English law to the 'privacy' action brought by Michael Douglas, Catherine Zeta-Jones and *OK!* magazine, notwithstanding that the intrusion occurred in New York. It was there, in a room of the Plaza Hotel they

[49] A Dickinson, 'Reading the Tea Leaves: Private International Law in England after EU Exit' (*Oxford Business Law Blog*, 26 October 2016) www.law.ox.ac.uk/research-subject-groups/commercial-law-centre/blog/2016/10/reading-tea-leaves-private-international.

[50] Yeo describes three approaches to characterising and dealing with such issues. See TM Yeo, 'Choice of Law for Equity' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Pyrmont, NSW, Law Book Co, 2005) 147; R Stevens, 'Choice of Law for Equity: Is it Possible?' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Pyrmont, Law Book Co, 2005) 173.

[51] See further Davies, Bell and Brereton (n 32) [21.12]–[21.13].

[52] Yeo (n 50) 167–70.

[53] Lord Collins of Mapesbury and Jonathan Harris, *Dicey, Morris & Collins on the Conflict of Laws*, 15th edn (London, Sweet & Maxwell, 2012) vol 2, [34-091]–[34-092], [35-141]. It was pointed out that this was a revision of a tentative view expressed in an earlier edition, and relied upon by the Court of Appeal in *Douglas* (CA) (n 4), that a claim for breach of confidence could be categorised as a claim for unjust enrichment.

had hired for the celebration, that confidential and private information – photographs of their wedding celebrations – was collected by a trespasser, a paparazzo disguised as a waiter. However, that information was published in the UK by *Hello!* magazine. This event was considered sufficient to treat the action for breach of confidential information as having occurred in England, so as to attract the application of the law of England and Wales. Critically, the fact that no tort against the Douglases might have been committed in New York, either by the intrusion or by subsequent publication in New York, was not enough to defeat the Douglases' claim of unlawful publication in the UK.[54]

Lord Phillips had commented:

> The Douglases' claim in relation to invasion of their privacy might seem most appropriately to fall within the ambit of the law of delict. We have concluded, however, albeit not without hesitation, that the effect of shoe-horning this type of claim into the cause of action of breach of confidence means that it does not fall to be treated as a tort under English law …[55]

Commenting on that earlier case, the Court of Appeal in *Google Inc v Vidal-Hall* noted that no party in *Douglas v Hello! Ltd (No 3)* had argued that the claim was one in tort, or that the Private International Law (Miscellaneous Provisions) Act 1995, dealing with tort claims, was relevant. Therefore, Lord Phillips' comments were obiter. Effectively, the Court of Appeal distinguished the decision in *Douglas* as one dealing with the traditional, equitable action for breach of confidence, thus leaving the way open to a different classification for the new 'extended' action.

The Court of Appeal also distinguished *Kitechnology BV v Unicor GmbH Plastmaschinen*[56] on this basis. That case concerned the issue of whether English courts had jurisdiction to hear the particular dispute under Article 5(3) of the Brussels Convention 1968, which then applied to matters of tort.[57] The Court of Appeal in *Kitechnology* had held that claims for breach of confidence do not arise in tort for historical reasons:

> The decision in *Kitechnology*, therefore, turned on the historical distinction that existed before the Judicature Act 1873 between the courts of common law and the Court

[54] A similar approach was taken more recently in *Weller v Associated Newspapers Ltd* [2015] EWCA Civ 1176, [2016] 1 WLR 1541.

[55] *Douglas* (CA) (n 4) [96].

[56] *Kitechnology BV v Unicor GmbH Plastmaschinen* [1995] FSR 765.

[57] See now Civil Jurisdiction and Judgments Act 1982. As to when a court will have jurisdiction to hear a multi-state or international dispute, see further Moreham and Warby (n 7) [13.56]: 'In privacy, as in defamation claims, the court will assume jurisdiction provided the tort committed within its territory is "real and substantial"'. Contrast [13.65]: defamation claims are now subject to a 'clearly the most appropriate place' test under s 9 of the Defamation Act 2013 (UK), to prevent so-called 'libel tourism'. In Australia, jurisdiction in actions *in personam*, including tort, contract or equitable claims for relief, depends on service of the process. See further Davies, Bell and Brereton (n 32) ch 3. A defendant disputing the appropriateness of the forum must satisfy a test that it is a 'clearly inappropriate forum': *Voth v Manildra Flour Mills Pty Ltd* [1990] HCA 55, (1990) 171 CLR 538, discussed in Davies, Bell and Brereton (n 32) [8.13]–[8.23]. The authors note, at [8.22], that this case presumably overrides the previous practice, whereby equitable relief in respect of events occurring abroad could be refused on the ground that the foreign court was the more appropriate forum.

> of Chancery. It would seem an odd and adventitious result for the defendant, if the historical accident of the division between equity and the common law resulted in the claimants in the present case being unable to serve their claims out of the jurisdiction on the defendant. …
>
> We accept that the decision in *Kitechnology* would be binding on us if the cause of action for misuse of private information were an action for breach of confidence. But for the reasons already given, it is not.[58]

The Court concluded, much as Tugendhat J had done, that 'in the absence of any sound reasons or policy or principle to suggest otherwise … misuse of private information should now be recognised as a tort for the purposes of service out the jurisdiction'.[59]

The Court did not include choice of law (or other conflict-of-laws issues) in its list of still-to-be-worked-out ramifications of categorising the wrongful disclosure of private information as a tort. Presumably, this is because its classification, for the purposes of allowing service outside the jurisdiction under the CPR, would also bring the tort within the Private International Law (Miscellaneous Provisions) Act 1995. However, any assumption as to the application of the 1995 Act would be, strictly speaking, obiter, and it is just as possible that another court could come to a stricter view as a matter of statutory interpretation. Even if the legislative term 'tort' is ambulatory and new torts coming into being after 1995 are encompassed in its application, it is difficult, as we point out at the beginning of this chapter, to see how this action has become a tort when the courts keep denying, as the Court of Appeal did here, and as members of the House of Lords had done previously, that they have created a new cause of action, while at the same time distinguishing it from a well-established equitable one.

Perhaps the issue would be side-stepped, for private international law purposes at least, if a court could conclude that the legislator of the 1995 Act intended to use 'tort' in the wider sense of all non-contractual wrongs, as Yeo suggests. *Gurry* supports Yeo's position on breach of confidence claims where liability results from fault.[60] But in many cases of breach of confidence, liability for active disclosure or misuse is strict,[61] once there is knowledge or notice, 'objectively assessed', of the information's confidential character.[62] Again, this illustrates that it may be premature to classify the cause of action for misuse of

[58] *Vidal-Hall* (CA) (n 2) [48]–[50].

[59] ibid [51].

[60] Aplin et al (n 8) [23.81].

[61] *Seager v Copydex Ltd* [1967] 1 WLR 923; *Interfirm Comparison (Aust) Pty Ltd v Law Society of New South Wales* [1975] 2 NSWLR 104; *Talbot v General Television Corp Pty Ltd* [1980] VR 224. See further Aplin et al (n 8) [15.31]–[15.41].

[62] Aplin et al (n 8) [15.05], citing *Re Smith Kline and French Laboratories (Australia) Ltd* [1990] FCA 206 *per* Gummow J. On the issue of knowledge of confidentiality as binding the conscience of the defendant, see *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] UKSC 31, [2013] 1 WLR 1556, [25] *per* Lord Neuberger.

private information, new or not, before its elements – including the element of fault or strict liability – have been clearly defined by the courts. Yeo's suggestion would seem to be supported by other academic commentators, who argue that the term 'tort' is 'underdetermined'.[63] It would have ramifications beyond privacy actions, and have the advantage of giving some certainty as to the applicable law in other cross-border equitable claims. However, it seems inconsistent with the approach taken in *Kitechnology*, which the Court of Appeal in *Google Inc v Vidal Hall* was at pains to distinguish.

As the Court of Appeal implicitly acknowledged by expressly putting to one side 'the circumstances of its "birth"',[64] the mystery of the birth of the new tort, in both time – occurring sometime between 2004 and 2015 – and judicial method, is an obstacle, some might think more than just an inconvenient detail, in the broader classification of this modern-day action. As Lord Millett said in another context, 'The correct classification of the claimants' cause of action may appear to be academic, but it has important consequences … causes of action have different requirements and may attract different defences.'[65]

It is noteworthy that, despite *Google Inc v Vidal Hall*, Moreham and Warby still refer to the 'remaining uncertainties as to the correct categorisation of the causes of action for misuse of private information and breach of confidence' before discussing applicable law in international disputes.[66]

III. Vicarious Liability

One of the implications the Court of Appeal identified as potentially arising out of classifying the privacy action as a tort was vicarious liability.

Many disclosures or misuses of private information may occur in contexts where various parties have responsibility for or access to the information, and questions may arise as to whether a defendant is vicariously liable for the tort of another person due to the defendant's relationship with that person. Vicarious liability for the tort of another person arises in three situations: where the actor was an employee (not an independent contractor) of the employer and was acting in the course of employment; where the actor was acting as agent of the defendant as principal; and where the tort was committed by a partner of the defendant.

The doctrine has been a significant and perennially contentious issue in the law of torts, but is one that is not generally mentioned in treatises on contract law or equitable principles. We briefly consider here why this might be so, and again what difference, if any, classification of the action might make.

[63] J Edelman, 'Equitable Torts' (2002) 10 *Torts Law Journal* 1.
[64] *Vidal-Hall* (CA) (n 14) [43].
[65] *Foskett v McKeown* [2000] UKHL 29, [2000] 2 WLR 1299, 1324, cited in Edelman (n 63) 3.
[66] Moreham and Warby (n 7) [13.82].

A. Vicarious Liability in Equity?

Perhaps the key reason why vicarious liability is not discussed in the context of contractual or equitable claims is that it is usually unnecessary for a claimant to rely upon the doctrine. First, it will be the employer (as defendant) who owes the relevant contractual or equitable obligation to the claimant. Secondly, it may be obvious that the relevant breach – the publication, communication or misuse of confidential information – was committed by the defendant in its own name. Thirdly, even where another person commits the relevant act, the issue will be whether the act of that other person, such as an employee or agent, can be *attributed* to the employer/principal so that it is *treated* as a breach by the employer/principal of its own personal obligation.[67] Such legal rules of attribution vary in different contexts.[68] A law firm has contractual and equitable obligations to its clients: a breach of those obligations by an employed solicitor is treated as a breach by the firm. Where a journalist employed by a media organisation is given or acquires confidential information, it may be the media organisation itself that is regarded as the confidant. In that sense, the contractual or equitable obligation to keep the information confidential is, to use terminology more accustomed in tort, a 'non-delegable' obligation.[69] If on the other hand, the act of the employee is not treated as a disclosure of confidential information *by* the employer, there will be no attribution to the employer and liability will rest on the employee alone.

A further reason why vicarious liability does not arise for discussion in equity claims is that equity has, at least since the second half of the seventeenth century, formulated its own basis for accessorial liability. It was recently noted in the context of an equitable claim:

> [T]he problem is that to apply the doctrine of vicarious liability in order to impose upon an employer, liability for a breach of trust (or fiduciary duty) by an employee, without more, would go beyond the ambit of accessorial liability as identified in *Barnes v Addy* (1874) LR 9 Ch App 244 and subsequent cases.[70]

Equitable liability thus rests squarely on the state of knowledge and level of participation of the particular party in the wrong. In that sense, liability in equity is based on personal conscience.

[67] This is a separate issue to the basis of liability, strict or 'fault' based, discussed in section II.C.

[68] *Director General, Department of Education and Training v MT* [2006] NSWCA 270, (2006) 67 NSWLR 237, applying *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] UKPC 5, [1995] 2 AC 500. See also Richardson et al (n 11) 78–79.

[69] A non-delegable duty may in fact be delegated, but the employer cannot escape liability for breach by delegating. See *Woodland v Essex County Council* [2013] UKSC 66, [2013] 3 WLR 1227.

[70] *Oliver Hume South East Queensland P/L v Investa Residential Group P/L* [2017] FCAFC 141 *per* Dowsett J, citing *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* [2017] FCAFC 74, (2017) 250 FCR 1, [123], in which the Full Court described the issue of vicarious liability as important. Leave to appeal to the High Court of Australia has been granted from the latter decision on issues of accessorial liability: [2017] HCATrans 210.

B. Vicarious Liability for a Tort of Misuse of Private Information?

Arguably, issues of attribution of conduct will also arise where misuse of private information as a tort is concerned. But because liability will generally arise from the nature of the information rather than from any pre-existing personal obligation of the employer or principal, different considerations may become relevant. Further, if misuse is treated as a tort then tort principles of vicarious liability would seem to apply as a matter of course.

It has been said that the doctrine of vicarious liability 'lies at the heart of all common law systems of tort law'.[71] Gilliker notes that while vicarious liability may appear fundamentally at odds with tort's traditional focus on individual responsibility, under both the common law and civil law systems, it may be best seen as a rule of responsibility rather than of attributed fault.[72] The long-established rationale of vicarious liability was stated by Isaacs J in the High Court of Australia thus:

> The principle on which the responsibility rests is that it is more just to make the person who has entrusted his servant with the power of acting in his business responsible for injury occasioned to another in the course of so acting, than that the entirely innocent party should be left to bear the loss.[73]

In other words, it can be seen as a form of enterprise liability, whereby the employer must carry the risks of its delegates being at fault in the course of the conducting of the enterprise. It is sometimes described as a strict liability in the sense that there is no personal fault on the part of the employer, yet there must be a tort committed by the employee, and most torts involve fault in the form of intent or negligence.

The most litigated issue in recent times in tort claims concerning vicarious liability has been the issue of whether deliberate, possibly criminal, conduct may fall within the 'course of employment'. The traditional approach, traced back to the first edition of Salmond's *Law of Torts* in 1907,[74] has been to identify whether the employee's conduct was an authorised act (clearly within), an improper, even a prohibited, mode of committing an authorised act (still within) or, on the other hand, an entirely remote and disconnected act, a 'frolic of his own'[75] as if a stranger to the employer (outside). While this approach may yield an answer as to on which side of the line many acts of an employee may fall, particularly in cases of

[71] P Gilliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge, Cambridge UP, 2010) [1.1].

[72] ibid ch 1.

[73] *Bugge v Brown* [1919] HCA 5, (1919) 26 CLR 110, 117. See also *Hollis v Vabu* [2001] HCA 44, (2001) 207 CLR 21, [35] *per* Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ: 'A fully satisfactory rationale for the imposition of vicarious liability in the employment relationship has been slow to appear in the case law.'

[74] JW Salmond, *The Law of Torts* (London, Stevens and Haynes 1917) 83, cited in *New South Wales v Lepore* [2003] HCA 4, 212 CLR 511, [42] *per* Gleeson CJ.

[75] *Joel v Morison* (1834) 6 Car & P 501, 503; 172 ER 1338, 1339 *per* Parke B.

negligence, the approach has proved unhelpful when considering certain examples of intentional, criminal behaviour, such as sexual assault by teachers or other carers in institutional settings. The trouble with such cases is that the employee is doing the opposite of what he or she was entrusted to do: protect the child or the patient. Yet the courts have not been prepared to dismiss the claim of vicarious liability, given that the child or patient came to harm while entrusted into the care of the employer. In such cases, Canadian and English courts have now formulated a test that asks whether there was such a close connection between the duties of the employee and the position in which he or she was placed vis-à-vis the victim, with English courts also asking whether it is therefore fair, just and reasonable in the particular circumstances to hold the employer vicariously liable.[76] The High Court of Australia, taking a slightly different approach, requires the court to look at whether the employee was placed in a position of power and intimacy, and whether the employer provided not merely the opportunity for the tort to be committed, but also the 'occasion' for the tort.[77]

How will these principles operate in respect of a tort of misuse of private information? If misuse encompasses intrusion or *collection* of private information, where there is no pre-existing obligation, the action is clearly analogous to existing torts, and the traditional test should yield a logical and just answer. Arguably, phone hacking or trespassing by an employed journalist is merely an unauthorised, possibly prohibited, mode of committing an authorised act: collecting information for a story. There are numerous examples of actions against media employers for trespass committed by employees.[78] Even though it involves criminal conduct, such conduct is nevertheless pursued for the employer's business and benefit, and would logically seem to fall within the course of employment and thus the employer's vicarious liability.

What of misuse by publication or communication? In any claim, it will become critical to determine whether a defendant is to be treated as having committed the new tort itself (including by the acts of people whose conduct is attributed to it). If so, vicarious liability may be redundant.

C. The Role of Fault in Liability

A related issue is whether some sort of fault is required for liability under the new tort.[79] Torts are generally divided into intentional torts, torts founded on negligence or strict liability torts, the last category increasingly rare at common law. In contrast, as previously mentioned, equitable liability is either strict or

[76] *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215.

[77] *Prince Alfred College Inc v ADC* [2016] HCA 37, (2016) 258 CLR 134. See also *Bazley v Curry* [1999] 2 SCR 534; *Jacobi v Griffiths* [1999] 2 SCR 570.

[78] See, eg, *TCN Channel Nine Pty Ltd v Anning* [2002] NSWCA 82, (2002) 54 NSWLR 333.

[79] See further McDonald (n 30).

conscience-based, with conscience, and thus liability, dependent on the state of a party's knowledge.[80] The basis of liability in tort affects defences and issues of remoteness of damage, and may also impact on an employer's liability.

For example, let us assume a wrongful disclosure of private information is committed by an employee of a bank or a doctor's surgery. To sue the employer on a 'personal' basis, the claimant would have to show both that the acts of the employee could be attributed to the employer and, unless the new tort is one of strict liability, some fault on the part of the employer. If either factor was missing, the claimant would need to fall back on vicarious liability and prove that the employee at fault was acting in the course of employment when he or she wrongfully disclosed the information. Either the traditional test for 'course of employment' or the local variant of the newer 'close connection' test would apply. The fact that the employee was acting deliberately, or even criminally, would not foreclose the issue.

D. Conclusion on Vicarious Liability

How vicarious liability will operate in the context of the new tort will depend on whether the wrong is fault-based or strict liability, and on whose duty or obligation is breached by a perpetrator in committing the wrong: only his or her own duties, or those of another party too? There is still much to be worked out, if misuse of information is indeed a tort for all purposes.

IV. Injunctions

The principal remedy for misuse of private information has been the injunction, sought on an interim or an interlocutory basis. It is fair to observe that the cause of action for misuse of private information has developed around the injunction as the main form of relief, shaping its current form. This is understandable in that, privacy, once invaded, can never be entirely restored.[81] For the orderly and principled development of the law relating to misuse of private information, however, the cause of action must be formulated to support a range of remedies that operate coherently against the background of other legal wrongs. Injunctions are sought

[80] *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] UKSC 31, [2013] 1 WLR 1556. See also Aplin et al, (n 8) [15.31]–[15.44].

[81] See, eg, *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [230] *per* Eady J; *Cooper v Turrell* [2011] EWHC 3269 (QB), [102] *per* Tugendhat J. In *Attorney-General v Newspaper Publishing Ltd* [1988] Ch 333, 358, Sir John Donaldson MR remarked that '[c]onfidential information is like an ice cube … Give it to the party who has no refrigerator … and by the time of trial you just have a pool of water'. See also New South Wales Law Reform Commission, *Invasion of Privacy* (NSWLRC Report 120, 2009) [7.16]–[7.18]; D Rolph, 'Irreconcilable Differences? Interlocutory injunctions for defamation and privacy' (2012) 17 *Media and Arts Law Review* 170, 191.

urgently, often with little time for detailed consideration of, and reflection upon, the legal issues and their implications.[82] There have been a number of appeals, to the Court of Appeal and to the UK Supreme Court, which have allowed for some deeper analysis.[83] Still, because the evolution of the cause of action for misuse of private information has been significantly through applications for injunctions, some fundamental doctrinal questions have remained unanswered.

Consistently with other wrongs, the classification of misuse of private information as either a common law or an equitable wrong will generally have an effect on the availability and grant of injunctive relief. Yet the evolution of misuse of private information from its origins in breach of confidence to a tort has not squarely identified this as an issue. It is settled that breach of confidence arises in equity's exclusive jurisdiction, being based on conscience, rather than being grounded in contract or property.[84] If misuse of private information is to be treated as an equitable wrong, like breach of confidence, it would also arise in equity's exclusive jurisdiction. A consequence for a claimant seeking injunctive relief in equity's exclusive jurisdiction is that he or she does not have to address whether or not damages would be an adequate remedy.[85] By contrast, if misuse of private information is properly classified as a tort, the grant of injunctive relief arises in equity's auxiliary jurisdiction, with the consequence that the adequacy of damages as a remedy should be a consideration on any application for an injunction.[86] The case law on injunctions for misuse of private information, though, suggests that the adequacy of damages has rarely been considered in this context.[87]

A. Injunctions and Breach of Confidence

The readiness with which injunctions are granted for misuse of private information is in part derived from the origins of the cause of action in breach of confidence.[88]

[82] See JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies*, 5th edn (Chatswood, NSW, LexisNexis Butterworths, 2015) [42-055].

[83] For England and Wales Court of Appeal decisions, see, eg, *AAA v Associated Newspapers Ltd* [2012] EWHC 2224 (QB); *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] 2 WLR 1645; *Ntuli v Donald* [2010] EWCA Civ 1726, [2011] 1 WLR 294; *Ash v McKennitt* [2006] EWCA Civ 1714, [2008] QB 73. For UK Supreme Court decisions, see *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081.

[84] Heydon, Leeming and Turner (n 82) [42-040] (citing *McKaskell v Benseman* [1989] 3 NZLR 75, 88), [42-060] (citing *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 164 CLR 414, 438).

[85] Heydon, Leeming and Turner (n 82) [21-015], [42-075].

[86] ibid [21-040], citing *Wood v Sutcliffe* (1851) 2 Sim (NS) 263; *Imperial Gas Light & Coke Co v Broadbent* (1859) 7 HLC 600, 612; *London & Blackwall Railway Co v Cross* (1885) 31 Ch D 354; *Fielden v Cox* (1906) 22 TLR 411; *Stollmeyer v Trinidad Lake Petroleum Co* [1918] UKPC 8, [1918] AC 485, 489; *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] AC 822, [159]–[160], [171]. See also *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46, (2006) 227 CLR 57; *Lenah Game Meats* (n 23).

[87] See, eg, *Terry v Persons Unknown* [2010] EWHC 119 (QB).

[88] Rolph (n 81), citing *Douglas v Hello! Ltd* [2001] QB 967 (CA); *Theakston v MGN Ltd* [2002] EMLR 22, [2002] EWHC 137 (QB); *A v B plc* [2002] EWCA Civ 337 [2003] QB 195 (CA).

Courts have always been ready to grant injunctions, or to make suppression or non-publication orders in claims involving confidential information. These routine derogations from the principle of open justice have been considered necessary to preserve the subject matter of the proceedings: once confidential information had entered the public domain, it loses its quality of confidence and there is nothing left for the court to protect. For a court to permit the subject matter of a claim to be destroyed, in advance of a trial on the merits of the claim, would be inimical to the proper administration of justice.[89] It is a small step from protecting confidential information in this way to protecting private information.

Further, even in those jurisdictions, unlike Australia, where a broad public interest defence is recognised to a claim for breach of confidence, the courts have recognised that there also is a public interest in protecting confidences.[90] The same applies in privacy claims, in which courts and commentators have stressed the public value of protecting privacy.[91] Thus, public interest considerations are a double-edged element in a claim for an injunction, whether the claim is one of confidence or of privacy.

B. Injunctions and Human Rights

The other impetus for the ready use of injunctions on an interim or interlocutory basis to protect private information is Article 13 of the European Convention on Human Rights (ECHR). This article requires signatory countries to ensure that individuals have an effective remedy for a breach of rights and freedoms protected under the ECHR. United Kingdom human rights jurisprudence readily accepts that an injunction is the most effective, or sometimes the only effective, remedy for misuse of private information.[92] Interestingly, the European Court of Human Rights is more open on this point.[93] For example, in *Mosley v NGN Ltd*, Eady J considered that 'it has to be accepted that an infringement of privacy cannot ever be effectively compensated by a monetary award', and that 'the only realistic course

[89] See, eg, *Scott v Scott* [1913] UKHL 2, [1913] AC 417; *Nagle-Gillman v Christopher* (1876) 4 Ch D 173; *Mellor v Thompson* (1885) 31 Ch D 55; *Hogan v Hinch* [2011] HCA 4, (2011) 423 CLR 506, 531.

[90] *Attorney-General v Guardian Newspapers Ltd (No 2)* [1988] UKHL 6, 29; [1990] 1 AC 109, 282.

[91] E Barendt, 'Privacy and Freedom of Speech' in AT Kenyon and M Richardson (eds), *New Dimensions in Privacy Law* (Cambridge, Cambridge UP, 2006) 11, 30–31. As to claims for misuse of private information where a public interest defence was established at trial, see *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB); *Spelman v Express Newspapers* [2012] EWHC 255 (QB).

[92] See, eg, R Clayton and H Tomlinson (eds), *Privacy and Freedom of Expression* (Oxford, Oxford UP, 2010); H Fenwick and G Phillipson (eds), *Media Freedom under the Human Rights Act* (Oxford, Oxford, 2006). See also D Eady, 'Injunctions and the protection of privacy' (2010) 29 *Civil Justice Quarterly* 411. This is reflected in statistics on injunctions granted in the UK in respect of misuse of private information: see, eg, Ministry of Justice, 'Statistics on privacy injunctions January to June 2013' (*Statistics Bulletin*, 19 September 2013), www.gov.uk/government/uploads/system/uploads/attachment_data/file/243813/privacy-injunctions-bulletin-jan-jun-2013.pdf.

[93] *Mosley* (n 81) [231].

is to select a figure which marks the fact that an unlawful intrusion has taken place while affording some degree of *solatium* to the injured party. That is all that can be done in circumstances where the traditional object of *restitutio* is not available.'[94] Eady J also considered that pre-publication notification was likely necessary for the granting of an injunction.[95] However, in *Mosley v United Kingdom*, the European Court of Human Rights rejected the submission that Article 8 of the ECHR requires pre-publication notification.[96]

Tending against the ready grant of injunctive relief for misuse of private information is section 12 of the Human Rights Act 1998 (UK). This section is engaged where the grant of relief 'might affect the exercise of the Convention right to freedom of expression'.[97] A court is not to grant an injunction before the trial unless it is satisfied that, at the trial, the claimant is likely to succeed.[98] In assessing this, the court is specifically directed to have particular regard to the Convention right of freedom of expression and whether what is sought to be published is in the public interest.[99] The working out of the principles relating to the grant of injunctions for misuse of private information not only involves ordinary equitable principles, but also entails a complex interplay with human rights instruments and legislation.

In countries such as Australia, without the underlying imperatives and authority of an instrument such as the Human Rights Act 1998 (UK), the development of the remedy of injunctions to protect privacy will take place against the historical division between equity's exclusive and auxiliary jurisdictions. It was decided in *Lenah Game Meats* that even broadly expressed statutory powers endowed on courts to grant injunctions do not expand the jurisdiction of the courts, and must be construed against the background of recognised legal or equitable rights and causes of action.[100] Whether the claim is based on a tort or contract[101] or on some grounds for equitable relief will therefore, theoretically at least, govern the factors the court must consider when adjudicating on the application for an injunction. However, the authors of Meagher, Gummow and Lehane note that

> [s]o strong has been the tendency of the courts to view almost any damage as irreparable, and so undemanding the requirement that irreparable damage must be demonstrated, that in recent years one might have categorised the test as being merely nominal.[102]

[94] ibid.

[95] ibid [209].

[96] *Mosley v United Kingdom* App 48009/08 [2012] EMLR 1, [132]. See also *Representatives Claimants v MGN Ltd* [2015] EWCA Civ 1291, [2016] 3 All ER 799, [89], where it was held that the adequacy of damages is a matter for national courts.

[97] Human Rights Act 1998, s 12(1).

[98] ibid, s 12(3). As to the meaning of 'likely' in this context, see *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2005] 1 AC 253.

[99] Human Rights Act 1998, s 12(4).

[100] *Lenah Game Meats* (n 23), considering *Supreme Court Civil Procedure Act 1932* (Tas), s 11(12).

[101] Where injunctions may be given to restrain the breach of an express or implied negative covenant without requiring proof of inadequacy of damages: *Doherty v Allman* (1878) 3 App Cas 709, 719–20.

[102] Heydon, Leeming and Turner (n 82) [21-040].

C. Injunctions and Tort

More contentious, particularly if the action is considered to be a tort, and in circumstances where the court is not concerned with enforcing a pre-existing obligation to keep information private, will be the issue of whether applications for injunctions for misuse of private information or other invasions of privacy should be treated with the same caution by the courts as applications for injunctions in defamation cases. Indeed, the interaction between the approaches to injunctive relief in defamation and privacy has only recently begun to be explored. It is well-established that an interim or interlocutory injunction is difficult to obtain for defamation, given the public interest in freedom of speech and the common law's aversion to prior restraint.[103] The issue of claimants' impermissibly circumventing defamation law's balancing of the defendant's freedom of speech[104] by framing the claim for an injunction as one to protect privacy rather than reputation is a real one, and has begun to be debated in the English courts.[105] The working test, such as it is, is that a court should not permit a claimant to circumvent the restrictive approach to injunctive relief in defamation by framing a claim in some other cause of action. However, where the facts would support a cause of action in defamation and equally in some other cause of action, the claimant could obtain an injunction on that other cause of action, even if the effect of the injunction is to restrain an arguably defamatory publication that could not be restrained by relying upon defamation alone.[106] The test then resolves itself to whether the essence of the claimant's claim is the protection of reputation or some other interest.[107] The courts have offered no real guidance as to when a matter is concerned essentially with reputation and when it is not. It is very much a matter of the judge's characterisation of the claims before the court, on the partial basis disclosed on an interim or interlocutory application. It is not difficult to imagine scenarios in which a person's reputation and privacy are both equally implicated by a threatened publication. After all, reputation and privacy are simply the public and private aspects of an individual's persona. Allowing for the ready grant of injunctions for misuse of private information provides claimants with an incentive to frame their claim in that cause of action, even if the claim is arguably one in defamation and would previously have been dealt with on that basis. Unsurprisingly, claims for defamation have been declining markedly in London, formerly the libel capital of the world, eclipsed by claims in privacy. The remedial advantages offered by a cause of action in privacy are a significant reason for this development.

[103] See *Bonnard v Perryman* [1891] 2 Ch 269; *O'Neill* (n 86) [17]–[19] *per* Gleeson CJ and Crennan JJ, [80]–[82] *per* Gummow and Hayne JJ.
[104] As to which in Australia, see *O'Neill* (n 86).
[105] *Terry v Persons Unknown* [2010] EWHC 119 (QB).
[106] See Rolph (n 81), quoting *Service Corp International Plc v Channel Four Television Corp* [1999] EMLR 83.
[107] *Woodward v Hutchins* [1977] 1 WLR 760, 764 *per* Lord Denning MR.

V. Damages

The focus on injunctive relief as the principal remedy for misuse of private information has had the effect that the principles relating to the award of damages for this cause of action are comparatively underdeveloped. There are now a number of claims in which damages have been awarded for misuse of private information,[108] but these are few in comparison to the vast case law on injunctions. Unsurprisingly, then, fundamental doctrinal questions have not been resolved about the principles governing damages for misuse of private information. Many of those questions arise from the uncertainty as to whether misuse of private information should be classified as an equitable wrong or a tort.

This uncertainty raises a threshold question as to whether damages, properly speaking, are a remedy for this cause of action at all. If misuse of private information is an equitable wrong, derived from breach of confidence, then equitable compensation, rather than common law damages, would seem to be the proper remedy. This has not emerged as a doctrinal problem in the English case law on misuse of private information[109] but will likely be an issue under Australian law. Indeed, it may be an impediment to Australian law's developing a more direct and effective protection of privacy through the preferred judicial method of extending and adapting breach of confidence.[110]

If misuse of private information is equitable, equitable compensation may be awarded in a straightforward manner if equity recognises the underlying interest as worthy of its protection. This has not yet happened under Australian law outside traditional breach of confidence cases. The leading Australian case on protecting private information through breach of confidence, the Victorian Court of Appeal decision in *Giller v Procopets*,[111] suggested that a claimant's entitlement to equitable compensation was to be determined under a form of *Lord Cairns' Act*. In *Giller v Procopets*, the trial judge, Gillard J, was prepared to accept that the claimant had a prima facie claim for breach of confidence: the sex tapes that were the subject of that claim constituted information with the necessary quality of confidence; they were imparted in a de facto relationship, being a relationship importing an obligation of confidence; and their unauthorised disclosure caused the claimant relevant detriment in the sense of her humiliation in the eyes of her family, friends and work colleagues.[112] However, as the claimant had not sought an injunction and as there was no scope for specific performance, His Honour found that damages could not be awarded 'in addition to, or in substitution for, an injunction or specific

[108] See, eg, *Campbell* (n 9); *Mosley* (n 81); *Weller* (n 54).

[109] For examples of damages for distress being awarded for misuse of private information in English case law, see NA Moreham, 'Compensating for Loss of Dignity and Autonomy', in ch 5 of this book.

[110] *Lenah Game Meats* (n 23) [40] *per* Gleeson CJ), [110] *per* Gummow and Hayne JJ); *Giller* (CA) (n 24) [430]–[431].

[111] *Giller* (CA) (n 24).

[112] *Giller v Procopets* [2004] VSC 113, [149], [153], [156].

performance' for the purposes of section 38 of the *Supreme Court Act 1986* (Vic), the *Lord Cairns' Act* provision in that jurisdiction.[113] On appeal, the Victorian Court of Appeal found that compensation could be granted under section 38 of the *Supreme Court Act 1986* (Vic) because it was not necessary that the claimant had in fact applied for an injunction; all that was required was that the court had the jurisdiction to entertain such an application. Notwithstanding the majority's reliance on the *Supreme Court Act 1986*, and the rather odd analogy with existing tort law (which would *not* have given the claimant a remedy), the best argument in favour of the award of equitable compensation for mental distress in a breach of confidence claim would seem to be equity's remedial flexibility to protect the underlying interest. As Neave JA said in that case, 'An inability to order equitable compensation to a claimant who has suffered distress would mean that a claimant whose confidence was breached before an injunction could be obtained would have no effective remedy.'[114] As equity has protected personal private information since the very earliest cases of breach of confidence, such as *Prince Albert v Strange*,[115] that protection must support a right to compensation for harm caused. This of course gives rise to the question of why distress should be treated as harm in this but not other legal contexts.

If misuse of private information is properly characterised as a tort, the availability of damages as a remedy is not necessarily less problematic. Again, a threshold issue will be whether mere mental distress as a result of misuse of privacy can be treated as actual damage. To do so would be contradictory to a long line of established cases based on any form of the 'action on the case': for example, the action based on the principle in *Wilkinson v Downton*[116] and the action of negligence.[117] If the same approach is followed in a privacy tort, then the only way that tort law could, coherently and consistently, allow compensation for distress would be to treat the privacy tort as analogous to trespass and other torts actionable per se.[118]

Although compensation or damages may be available as a remedy on some juridical basis, the heads of damages and the purposes for which they may be awarded remain problematic. Compensation for actual damage, whether in the form of equitable compensation or common law damages, will be available. Aggravated damages are likely to be available at common law, given that aggravated damages are compensatory in purpose. Indeed, aggravated damages are likely to be

[113] ibid [162]–[165].

[114] *Giller* (CA) (n 24) [424]. See also *Wilson v Ferguson* (n 24) [82].

[115] *Prince Albert v Strange* (1848) 2 DeG & Sm 652; 64 ER 293, affirmed (1849) 1 H & Tw 1; 47 ER 1302.

[116] *Wilkinson v Downton* [1897] 2 QB 57.

[117] Cases arising out of negligence may also be limited by the civil liability legislation in most Australian States and Territories, which requires claimants to have suffered a recognised psychiatric illness and also limits damages recoverable in more minor claims. See, eg, *Civil Liability Act 2002* (NSW), pts 2, 3.

[118] It was for reasons of consistency and practical justice that the ALRC recommended that any statutory tort in Australia should be actionable per se, once other elements of the tort had been made out: ALRC (n 25) [8.39] et seq.

readily awarded in light of the nature of the impact of privacy breaches.[119] Again using the tort analogy, the Victorian Court of Appeal accepted in *Giller v Procopets* that aggravated damages are available for breach of confidence.[120]

The more difficult issue is whether exemplary damages are available for misuse of private information. Both Eady J in *Mosley v NGN Ltd* and the Victorian Court of Appeal in *Giller v Procopets* conclude that exemplary damages are not available to privacy claimants.[121] In these cases, the fact that the cause of action is equitable in origin is viewed as a bar to an award of exemplary damages. In *Giller v Procopets*, the Court, somewhat reluctantly, recognised that there was authority of a co-ordinate court – the New South Wales Court of Appeal in *Harris v Digital Pulse Pty Ltd*[122] – to the effect that exemplary damages could not be awarded for breach of fiduciary duty.[123] As equity is not a punitive jurisdiction, the Victorian Court of Appeal held, by parity of reasoning, that exemplary damages were not available for breach of confidence.[124] In *Mosley v NGN*, Eady J noted that misuse of private information had been incidentally referred to as a tort but that it had not been definitively established as such.[125] The original characterisation of the cause of action as equitable was influential upon Eady J's conclusion that exemplary damages could not be awarded for it. If misuse of private information is now properly characterised as tortious, this may necessitate the revisiting of this issue of principle.[126]

The distinction between equitable and tortious causes of action also affects the availability of restitutionary remedies, such as an account of profits. For claimants, the remedy is a valuable part of the armoury of equitable remedies in its exclusive jurisdiction for equitable wrongs. Traditionally only available in equity suits, it was also awarded for a (common law) breach of contract in the exceptional circumstances of *Attorney-General v Blake*,[127] but that is not a precedent followed in contract cases in Australia. However, if misuse of private information is a tort, there should be no barrier to an award of exemplary damages, which may have the similar intent and effect of stripping the defendant of his or her ill-gotten gain in contumelious disregard of the claimant's rights.[128]

[119] Indeed, they are sometimes referred to as 'aggravated compensatory damages'. See, eg, *Amalgamated Television Services Pty Ltd v Marsden (No 2)* [2003] NSWCA 186, [18]. See also *Gulati v MGN Ltd* [2015] EWCA Civ 1291, [2017] QB 149, [45]–[48] *per* Arden LJ). See further JNE Varuhas, 'Varieties of Damages for Breach of Privacy', in ch 3 of this book.

[120] See also *Mosley* (n 81) [176], [193] *per* Eady J.

[121] *Mosley* (n 81) [197] *per* Eady J; *Giller* (CA) (n 24) [156]–[158].

[122] *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10, (2003) 56 NSWLR 298.

[123] ibid [292]–[342] *per* Heydon JA.

[124] *Giller* (CA) (n 24) [158].

[125] *Mosley* (n 81) [182].

[126] See *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081, [92], where Lord Toulson JSC (dissenting) observed that Eady J's decision on exemplary damages in *Mosley* may not be 'the final word on the subject'.

[127] *Attorney-General v Blake* [2000] UKHL 45, [2001] 1 AC 268.

[128] *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71, 77 *per* Knox CJ. Cf *Rookes v Barnard* [1964] AC 1129, 1227 *per* Lord Devlin; *AB v South West Water Services Ltd* [1993] QB 507.

VI. Conclusion

Other chapters in this book deal in depth with the many interesting issues – both real and so-far hypothetical – that are engendered by the recognition of a cause of action for misuse of private information and other forms of invasions of privacy. Many of these will arise whatever the classification of the action. However, there are many issues as to which the outcome may depend on classification, not just as a matter of legal history and precedent, but also in the context of international disputes, where complex rules of private international law have developed. While no one should doubt the law-making capacity of judges in a common law system, their creativity is not at large, so that the development of the action must be coherent and, at least, not inconsistent with the law's treatment of other analogous wrongs.[129] It should be recognised that the task of developing a new cause of action, which is coherent in and of itself as well as being consistent with existing private law principles and doctrines and consonant with human rights obligations, is a difficult one. Sometimes pragmatic choices have been, or will be, made; sometimes decisions relating to classification and their attendant doctrinal consequences might need to be revisited and revised. The Court of Appeal in *Google Inc v Vidal Hall* was clearly alive to possible implications of its decision operating in a broader context. Whether that classification will be revisited in another context remains to be seen. There is still much to be worked out in the substantive and remedial content of any new tort of misuse of private information.

[129] PG Turner, 'Rudiments of the Equitable Remedy of Compensation for Breach of Confidence' in S Degeling and JNE Varuhas, *Equitable Compensation and Disgorgement of Profit* (Oxford, Hart Publishing, 2017) 239, argues that equitable compensation for breach of confidence should develop without reference to common law analogues, eg torts protecting purely personal interests (see esp 269ff).

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